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No. 85-329

In the Supreme Court of the United States

OCTOBER TERM, 1985

HENRY PAUL BRYANT, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 4-5) that the wire fraud statute, 18 U.S.C. 1343, requires proof that he knew or reasonably should have foreseen that the wire transmissions that he caused were in interstate commerce.

1. Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on three counts of mail fraud, in violation of 18 U.S.C. 1341, and two counts of wire fraud, in violation of 18 U.S.C. 1343. He was sentenced to concurrent terms of five years' imprisonment on the mail fraud counts and one of the wire fraud counts and to a $1000 fine and a suspended term of five years' imprisonment on the other wire fraud count. The court of appeals affirmed. Pet. App. A1-A14; 766 F.2d 370.

The evidence at trial, which is summarized in the opinion of the court of appeals (Pet. App. A2-A7), showed that petitioner and his co-defendant Melissa Dalton were principals in a convention-booking business and that they engaged in a scheme to defraud the city of St. Louis by paying more than $26,000 in bribes to the director of the city's convention center in exchange for favorable treatment in leasing the center. As part of their scheme, petitioners formed a bogus nonprofit corporation headed by Kathryn Mathews to request leases for various dates. At petitioner's direction, Mathews sent two telegrams from Kansas City, Missouri, to the convention center demanding additional lease dates and threatening to cancel one show if competing shows were scheduled immediately before or after it. Like all Western Union telegrams, these were routed through Middletown, Virginia.

The court of appeals rejected petitioner's argument that the government was required to prove that he knew or reasonably should have foreseen that the telegrams would travel in interstate commerce. Pet. App. A7-A11. Relying on "the words of the statute, the general purpose of interstate requirements, and the decisions of other courts," the court of appeals concluded that Section 1343's "requirement of an interstate nexus" was intended "solely for the purpose of conferring federal jurisdiction rather than defining substantive elements of [the] offense." *Id.* at A8-A9. The court further noted that "whether or not a defendant knows or can foresee that a communication is interstate, the offense is still every bit as grave." *Id.* at A9.

2. Petitioner's contention that the interstate commerce requirement of 18 U.S.C. 1343 is a substantive element of the offense requiring proof of knowledge or foreseeability is without merit. Petitioner admits (Pet. 4) that the "literal

meaning of the statute" supports the court of appeals' decision, and he does not point to a conflict with any decision of this Court or any other court of appeals. Further review is obviously unwarranted.

Petitioner does not challenge the sufficiency of the evidence showing that he engaged in a scheme to defraud or that he caused the transmission of the telegrams in furtherance of his fraudulent scheme.[1] Those actions completed the crime; nothing in the statute supports petitioner's contention that Congress, by including an interstate commerce requirement, intended anything other than to provide a basis for federal jurisdiction over the offense.[2] As the court explained in *United States* v. *Blassingame*, 427 F.2d 329, 330 (2d Cir. 1970), cert. denied, 402 U.S. 945 (1971):

> The use of interstate communication is logically no part of the crime itself. It is included in the statute merely as a ground for federal jurisdiction. The essence of the crime is the fraudulent scheme itself. * * * There is consequently no reason at all why guilt under the statute should hinge upon knowledge that interstate communication is used. * * * It is wholly irrelevant to any purpose of the statute that the perpetrator of the fraud knows about the use of interstate communication.

Accordingly, it is not necessary to show that petitioner knew or should have foreseen that the communications that

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[1] *United States* v. *Muni*, 668 F.2d 87 (2d Cir. 1981), on which petitioner relies (Pet. 4), addressed this element of the offense, not the question presented here.

[2] Petitioner does not dispute that transmission of the telegrams via Virginia satisfied the jurisdictional requirement of a nexus with interstate commerce. See Pet. App. A7 n.4; see generally, *e.g.*, *United States* v. *Davila*, 592 F.2d 1261, 1263-1264 (5th Cir.), cert. denied, 444 U.S. 843 (1979).

he caused to be made were in interstate commerce. *Id.* at 430-431; see also *United States* v. *Reid,* 533 F.2d 1255, 1260 n.19 (D.C. Cir. 1976).[3] This conclusion is in accord with decisions of this Court and various courts of appeals interpreting other statutes that require an interstate or other federal nexus. See, *e.g., United States* v. *Feola,* 420 U.S. 671 (1975); *United States* v. *Tyers,* 487 F.2d 828, 830-831 (2d Cir. 1973), cert. denied, 416 U.S. 971 (1974); *United States* v. *Roselli,* 432 F.2d 879, 891 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971); *Bibbins* v. *United States,* 400 F.2d 544 (9th Cir. 1968); see also *United States* v. *Yermian,* No. 83-346 (June 27, 1984), slip op. 5 ("jurisdictional language need not contain the same culpability requirement as other elements of the offense").

Contrary to petitioner's contention (Pet. 4), there is no anomaly in differentiating, for purposes of federal crimes, between otherwise similarly situated persons on the basis of whether their fraudulent activities touched upon interstate commerce: that is the obvious and necessary consequence of premising federal jurisdiction on an interstate nexus. In any event, petitioner's reading of the statute would do nothing to diminish the difficulty he perceives. It would be equally "anomalous" to distinguish between persons who

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[3]In any event, the jury was instructed fully in accordance with petitioner's view that " 'the interstate transmission by a participant or somebody else [must have been] reasonably foreseeable.' " See U.S. C.A. Br. 30 & n.7 (quoting instruction). The jury's finding of foreseeability, which petitioner does not directly contest, is supported by the common knowledge that Western Union is a nationwide concern and by the evidence at trial showing the procedures that Mathews used for sending the telegrams, such as dialing Western Union's toll-free "800" phone number. See *id.* at 29. In these circumstances, it was within the jury's province to conclude that petitioner reasonably could have foreseen that the telegrams would not necessarily be routed directly from one point in Missouri to another. Cf. *United States* v. *DeBiasi,* 712 F.2d 785, 791-792 (2d Cir.), cert. denied *sub nom. Eboli* v. *United States,* 464 U.S. 962 (1983).

have engaged in the same culpable activity merely on the basis of whether they knew or should have foreseen that the instrumentalities of their frauds were in interstate commerce. The same wrong has been accomplished in either case. As the Court stated in *United States* v. *Feola*, 420 U.S. at 685, "[t]he concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of a judicial forum."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1985

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